

WANG (Migration) [2017] AATA 1867 (6 October 2017)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms MENG CONG WANG
CASE NUMBER:	1615928
DIBP REFERENCE(S):	CLF2013/207647
MEMBER:	Adrienne Millbank
DATE:	6 October 2017
PLACE OF DECISION:	Brisbane

Statement made on 06 October 2017 at 5:36pm

DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.
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CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Not a genuine and continual relationship – Inconsistent information – Manufactured documentary evidence

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359AA

Migration Regulations 1994, r 1.09A, Schedule 2, cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 September 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 28 August 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. Simultaneous telephone interviews were conducted by the Department with the applicant and the sponsor on 8 July 2016. On 11 July 2016 the Delegate sent a natural justice letter to the applicant requesting a response, within 28 days, to concerns raised by inconsistent information provided by the applicant and the sponsor during the interviews. No response was received by the Department.
5. The Delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2). The delegate was not satisfied that the applicant was in a genuine and continuing relationship with the sponsor or that she and the sponsor lived together. In the summary of the record of decision the delegate wrote:

During the interview, neither you nor your sponsor were able to demonstrate that you had consistent shared knowledge of your living arrangements, nor did you display any consistent knowledge of each other's daily routine. You have not responded to the request to comment on the inconsistent information to date. Accordingly I am not satisfied that the nature of the household is that of a genuine spousal or de facto relationship.

I am not satisfied that you and your sponsor have pooled your financial resources in any way, have any significant joint assets or liabilities, have made any significant joint purchases, or that you share any day-to-day financial responsibilities...

There is no convincing evidence before me that demonstrates that you and your sponsor present yourselves as a couple to family, friends or the wider community, that you undertake regular joint social activities ...

During the telephone interview, you and your sponsor provided inconsistent information in relation to the financial and social aspects of your relationship, the nature of your household, and the nature of the commitment of your relationship. The inconsistent information that you have provided raises serious concerns that you may have provided false and misleading information to the department in order to obtain a favourable outcome for your visa application. The inconsistent information you have provided also casts doubt on the credibility of the claims you have made about the genuineness of your relationship. Despite being given an opportunity to comment on the conflicting information, no response has been provided.

In light of the significant lack of knowledge you and your sponsor have displayed about each other, and the substantial inconsistent information you both provided about your relationship, which you have chosen not to provide an explanation for, I find that much of the documentary evidence you have provided has been manufactured solely to support your visa application, and is not a genuine reflection of the true nature of your relationship with your sponsor'.

6. The applicant's representative provided to the Tribunal on 5 September 2017 a submission which argued that inconsistencies identified by the Delegate were the result of 'misunderstandings' due to the applicant's poor English and the fact that she did not have at the time of application a representative who spoke Mandarin. The representative argued further that inconsistencies in the information provided by the parties regarding their living arrangements, and the sponsor's description of himself on Facebook on 8 July 2016 as 'still single' were also the result of misunderstandings, and that the sponsor's Facebook account had in fact been hacked by a friend as a prank.
7. A copy of the Delegate's decision was provided to the Tribunal by the applicant.
8. The applicant appeared before the Tribunal on 21 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
9. The Tribunal questioned the applicant as to her need for an interpreter, given that since 2003 she has studied or been enrolled to study in Australia including at tertiary level, and has worked and was working at the time of decision in English-speaking workplaces. The applicant advised that she had only a poor level of English and required an interpreter for everything that was said during the hearing.
10. The Tribunal advised the applicant, pursuant to s.359AA of the Act, that it had information that would lead or could contribute to the decision under review being affirmed. It advised that this was information provided by the applicant and the sponsor that was found by the Delegate at the time of application to be inconsistent and misleading. It advised that this information was contained in transcripts of the simultaneous telephone interviews that were conducted with the parties on July 2016, and the subsequent natural justice letter that was sent to the applicant inviting her response to the Delegate's concerns. The Tribunal also advised that it was in printouts from the parties' Facebook entries, which were on the Departmental file and referred to in the Delegate's decision.
11. The Tribunal acknowledged that it had received and would take account of the rebuttal of the Delegate's findings in the representative's submission but advised that nevertheless it would be asking questions based on information contained in the aforementioned documents on the Departmental file and that when it did, the applicant could request an adjournment and consult with her representative. The applicant sought and was granted one brief adjournment during the hearing.
12. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

14. The applicant was born in 1986 in Beijing, China. She first arrived in Australia in 2003, on a Student (subclass 571) visa. In 2006 she was granted a Student (subclass 573) visa on the basis of her enrolment in a degree-level course in Creative Design at QUT. In 2007 she enrolled in a Certificate 3 level course in Commercial Cookery and Hotel Management at the Hospitality Training Association. In 2012 she enrolled in a Bachelor of Business Course at Griffith University, on another Student (subclass 573) visa with an expiry date of 30 August 2014. At the time of decision she was working as a kitchen hand in a Hog's Breath restaurant in Brisbane.

15. The sponsor was born in Tianjin, China in 1987. He migrated to Australia with his mother and sister in 2002 and obtained citizenship by grant in 2004. He has worked in Brisbane as a sales manager in real estate. At time of decision he was working on a full-time, shift-work basis in the Brisbane Casino.
16. The parties claim to have met in 2006 when they were both working at Donut King in Brisbane. They claim that their friendship developed into a relationship sometime in 2011, and that they moved in together and entered into a de facto relationship on 16 July 2012.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the applicant is in a genuine de facto relationship with the sponsor at the time of this decision.
18. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

19. As the parties are not validly married, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
20. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

FINANCIAL ASPECTS OF THE RELATIONSHIP

21. Evidence was provided in the form of statements of transactions that the parties have had a joint bank account since July 2012. Statements of transactions from the parties' personal accounts from 2013–2016 were also provided. A statement from the joint account for the period 27 July–26 September, the latest provided, shows one transaction of \$8 and a closing balance of \$7. Earlier statements had shown significant transfers to and from other bank accounts, but little evidence that the account was used to fund a joint household or savings. The Tribunal asked the parties at hearing why they opened a joint account, as they didn't use it. The applicant stated that the parties had intended to use the account when it was opened but that it didn't suit them so they stopped using it. The sponsor subsequently stated that he agreed to open a joint account 'because (the applicant) wanted to'.
22. When asked who paid the rent and other household expenses, the applicant stated that she and the sponsor 'shared it half and half'. Asked why they didn't use the joint account for joint expenses, the applicant stated that the sponsor would spend money that was deposited in it and she was saving to buy a house. She stated that she was saving money in her personal

account. The sponsor conceded that he spends more than the applicant, but argued that he earned more and is entitled to spend his own money. He stated that he preferred to have his own bank account and to manage and spend his own money separately from the applicant.

23. The Tribunal asked the sponsor whether he was also saving to buy a house, as this was a relationship goal declared by the parties at the time of application. He stated that he was, and that he was in the process of looking at possible properties. The Tribunal pointed out to the sponsor that the closing balance in his personal bank account, as at 30 September 2016, the latest date shown in the statements provided, was \$6. The sponsor then claimed that he was saving money in cash, and that this was in accordance with Chinese culture.
24. The closing balance in the applicant's personal bank account as at 19 August 2016, the latest date shown in the statements provided, was \$766. When the Tribunal questioned the applicant as to whether the parties were in fact saving to buy a house together, she stated that her mother would provide her with the deposit to buy a house. The sponsor advised later in the hearing that this was however contingent on the applicant being granted a Partner visa: if the applicant did not obtain permanent residence her mother would not provide her with the deposit for a house.
25. Apart from a number of jointly-signed leases for properties rented from 2012–2014 no evidence was provided that the parties, who claim to have been in a de facto relationship for over five years, have or ever have had any joint assets or joint liabilities or financial obligations to each other. The Tribunal asked the parties whether they had bought or leased cars since they had been together. The applicant stated that her mother had purchased a car for her. The sponsor stated that he has purchased a car. In response to questioning he stated that he had borrowed money and registered his car in his name only. He explained that because of her temporary visa status and low income the applicant could not get a bank loan. He stated that if she had been able to contribute her share he would have registered it in joint names.
26. Apart from the jointly signed rental agreements no evidence was provided that the applicant and the sponsor have pooled their financial resources or that they share day-to-day expenses. Indeed, significant evidence was provided that the parties have maintained independence and separateness in their financial arrangements.
27. The Tribunal is not satisfied that the financial aspects of the parties' relationship are consistent with them being in a genuine de facto relationship.

NATURE OF THE HOUSEHOLD

28. Copies of joint tenancy agreements were provided for properties in Calamvale, Macgregor, Sunnybank from 2013–2014. At time of decision the parties claimed to be living together in a house in Algester which they were sharing with a friend of the applicant and her daughter, but for which they claimed no lease was required as it was the property of their housemate's former partner. At hearing the parties advised that they have always shared their accommodation with other people, even where they have been the only ones to sign the lease agreement, because they needed to share the costs.
29. The applicant claimed that the parties shared the housework in their shared houses. She advised that at time of decision she and the sponsor worked shifts and they both ate two meals a day at their workplaces, so neither of them did much in the way of food purchasing and preparation. She said that they each purchased take-away meals, sometimes shared meals with their housemates, and sometimes ate out.

30. The Tribunal advised the applicant that it was raising an issue of concern arising from information in documents in the Departmental file, where the parties had appeared to provide inconsistent and misleading information, as noted at the outset of the hearing. The applicant was made aware of the relevance of the information and the consequences of relying on it. She was reminded that she could seek an adjournment and could consult with her representative if she wished. The Tribunal advised that this information was from the parties' passenger cards, when they returned, on separate flights and on different dates, from a visit to China in July 2016. According to the sponsor's passenger card he was living at the time at an address in Salisbury, which is the address of the sponsor's mother. He had also listed as his emergency contact his mother, and provided her phone number. The applicant listed a different residential address, and did not name an emergency contact. The Tribunal advised the parties that the information it had included that the sponsor had used his mother's address as his own residential address for other official purposes, including his car registration.
31. The sponsor in response claimed that he listed his mother as his emergency contact on his passenger card because he didn't realise he was expected to list the applicant. He claimed that he used his mother's address as his own address for purposes like car registration because he moved house often and his mother's address was stable. He stated further that using his mother's address saved him from having to re-direct his mail when he went on holidays. The Tribunal asked the applicant why she didn't also use the sponsor's mother's address as her residential address, for the same reason. The applicant replied, following a lengthy pause, that she had a friend with whom she could leave her car when she went on holidays.
32. The sponsor's Facebook profile picture shows him standing with his car in front of a house which does not appear to be the house he was supposedly living in with the applicant at this time.
33. The Tribunal accepts that the parties signed a number of joint rental agreements. Invoices were provided from energy companies showing that the sponsor paid several utilities bills at some of the properties that the parties have leased in joint names in 2013 and 2014. The Tribunal accepts that the parties have lived in the same shared houses. The Tribunal however is not satisfied that the parties have lived in the same shared houses consistently since they claim to have entered into a de facto relationship on 16 July 2012. The Tribunal is not convinced by the explanations provided by the parties regarding the sponsor's use of his mother's address because the applicant provided no reasonable explanation as to why she did not also use the sponsor's mother's address for the same claimed purpose and reasons.

SOCIAL ASPECTS OF THE RELATIONSHIP

34. The applicant claims to have met the sponsor's mother and school-aged sister, but said that because the sponsor does not get along with his mother they only got together with her about once a year. The Tribunal asked the applicant how they could avoid seeing the sponsor's mother more often than once a year, as the sponsor uses her residential address as his own for mail purposes. The applicant stated that the sponsor did this only once, when he went on holidays, but forgot to change it afterwards. The sponsor however subsequently stated that he held a key to the external mailbox at his mother's house, and collects his mail without having to speak with his mother.
35. The sponsor claims to have met the applicant's mother when she visited Australia in 2015 and again when the parties travelled to China together on 10 July 2016. In response to questioning the applicant stated that the parties spent three days in Beijing before the sponsor went to visit his family in Tianjin; that they returned to Australia at different times

because they had different amounts of holiday leave; and that she did not travel with the sponsor and meet his family because it was raining at the time and too wet for her to travel.

36. Photos were provided of the parties on a plane together, eating together and with friends in Cairns and on the Gold Coast.
37. Two statutory declarations signed in August 2015 were provided at the time of application by friends and former colleagues of the applicant who stated that they had met the sponsor and knew the parties to have travelled and gone whale-watching together. No witness statements in support of the relationship were provided by any family members, and no further witness statements were provided to the Tribunal.
38. At hearing the sponsor stated that the parties both worked unsociable hours and that they did not entertain or go out with friends much. He stated that if they had a free evening they both preferred to relax at home and watch television.
39. The Tribunal is not satisfied on the evidence provided that the parties are recognised and related to by family members as a de facto couple or, apart from the limited circumstances described above, that they function socially and present themselves in the community generally as a couple in a de facto relationship.

NATURE OF PERSONS' COMMITMENT TO EACH OTHER

40. The parties claimed at the time of application that travelling together was a relationship goal. They provided evidence, as noted above, of going on short trips with friends to Cairns and the Gold Coast. As noted, the parties travelled together to China on 10 July 2016, but spent only three days in the same city before they went separate ways.
41. Photos of the parties' Costco membership cards were provided with consecutive membership numbers showing that they signed up at the same time.
42. A printout in July 2016 of the sponsor's Facebook profile page, as noted above, shows him alone, and showcases his car and a house that is not the house where parties claim to have been living together at this time. There are no photos and there is no mention of the applicant in the printouts of entries from this time, and in conversational banter with a friend, the sponsor states: 'I am still single'. Printouts from the applicant's Facebook show the sponsor listed as a 'friend', but there are no photos of the parties together as a couple, and there is no other mention of the sponsor. The applicant's Facebook entries at this time comprise mainly photos of herself in game-type costumes. When the Tribunal asked the applicant why there was no mention of the sponsor and no photos of her with the sponsor in her Facebook entries, she stated that she didn't know anything about Facebook and wasn't interested in it. She said she had only agreed being photographed posing as characters in various games because a friend asked her to.
43. In the representative's submission and at hearing the sponsor claimed that his Facebook page had been hacked. He showed the Tribunal a text message on his phone where he complained about being hacked on Facebook. When the Tribunal pointed out that his 'I am single' statement was part of a continuing conversation with a friend, he stated that the remark was in fact meant in jest, that he had been joking around and hadn't intended his throwaway line to be taken seriously. He pointed out that in his Facebook profile at this time he was identified as 'in a relationship'. The Tribunal accepts the sponsor's explanation that he was joking around, but is of the view that despite profiling himself as 'in a relationship' he perceived himself at this time, and still perceives himself, as 'still single'.

44. The Tribunal asked the parties what they had done in pursuit of another of their relationship goals declared at time of application, namely to get married. The sponsor stated that in accordance with their Chinese culture, they had first to attain the security of owning their own house. He advised, as noted above, that the applicant's mother would provide the deposit for a house, but only if the applicant was granted a Partner visa. He stated also that if the applicant had a visa she would be able to earn more and borrow money and that, as with his car, if the applicant contributed her share he would agree to a house being put in joint names.
45. The applicant when asked about her stated goal of getting married stated that her mother had told her to buy property first. The sponsor repeated what he had said earlier in the hearing regarding the parties' financial arrangements. He stated for the benefit of the understanding of the Tribunal that without a visa there would be no deposit, without a deposit there would be no house, and without a house there would be no marriage.
46. The Tribunal asked the sponsor whether the parties had discussed what they might do if the applicant did not get a Partner visa; whether they had considered living in China, at least for a time. The sponsor stated that he would have to consider his annual leave entitlements before agreeing to travel anywhere.
47. The Tribunal found little evidence of emotional closeness between the applicant and the sponsor or that they have been working collaboratively towards meeting the relationship goals and aspirations they identified at the time of application, including getting married and purchasing a house of their own. The Tribunal has had regard to the reasons provided for the parties' failure to get married and establish their own household and finds them to be unconvincing and not indicative of their being in a genuine de facto relationship. The Tribunal is not satisfied that the commitment aspects of the relationship are consistent with their being in a genuine and continuing de facto relationship.

ANY OTHER RELEVANT CONSIDERATIONS.

48. The responses that the applicant gave to questions at hearing were often vague and non-committal. When asked how she managed to enrol in tertiary-level courses in Australian universities without appearing to have the required level of proficiency in English, she appeared to have trouble recalling what courses she had enrolled in and when, and couldn't say what sort of student visas she held. She claimed that she had never had to sit for and pass an English language test. When asked why she didn't respond to the Department's invitation to respond to the letter setting out concerns following the parties' interview, she said that she was in China at the time and so couldn't access her emails. When the Tribunal asked why the sponsor, who returned to Australia earlier than the applicant, didn't check her emails for her, as there might have been something important, like a letter from the Department, she said that she had in fact taken her lap-top to China with her. She then stated that she did in fact access her emails while in China, but that she wasn't familiar with and didn't like emailing and must have deleted the letter from the Department by mistake.
49. The applicant's representative, in a closing oral submission, argued that the fact that the parties' relationship didn't fit neatly into conventional criteria didn't mean it wasn't genuine. He argued that it was not unusual, for example, for married couples to maintain their own personal bank accounts. He advised the Tribunal further that the applicant was a confused person, and that this had contributed to misunderstandings. He stated that he had found the applicant to be vague and non-responsive to questions that he asked her in Mandarin, and so her confusion and the misunderstandings with the Department were not solely due to her inability to speak and understand English.

FINDINGS

50. The Tribunal has considered the submissions from the applicant's agent, but does not accept that the applicant was in a state of confusion at the hearing such as to explain why she provided vague and evasive answers to the Tribunal. The Tribunal is of the view that the applicant understood the proceedings.
51. The Tribunal accepts that the parties have lived together in shared houses and gives some weight to this as an indication of their being in a de facto relationship. The Tribunal has weighed this consideration against other indications that they are not. As discussed above, the Tribunal is not satisfied that the financial aspects of the parties' relationship are consistent with them being in a de facto relationship. The Tribunal is not satisfied on the evidence provided that the parties are recognised and related to by family members as a de facto couple or, apart from the limited circumstances noted above, that they function socially and present themselves in the community generally as a de facto couple.
52. The Tribunal is not satisfied, on the basis of how the parties have presented themselves on social media and on the basis of their acknowledgement that the marriage they claim to want is contingent on the grant of the visa, that the commitment aspects of the relationship are consistent with their being in a genuine relationship.
53. Having considered all the evidence and information and the circumstances of the relationship against r.1.09A(3) matters the Tribunal is not satisfied that the applicant and the sponsor have a mutual commitment to a shared life and it is not satisfied that they are in a genuine and continuing relationship.
54. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
55. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
56. For these reasons the Tribunal is not satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
57. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

58. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Adrienne Millbank
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).